

FEBRUARY 7, 2019

OFFICE OF LEGISLATIVE COUNSEL WISCONSIN LEGISLATURE

PRESENTED BY:

JESSICA KARLS-RUPLINGER
ACTING DIRECTOR
WISCONSIN LEGISLATIVE COUNCIL

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT



OFFICE OF LEGISLATIVE COUNSEL

OVERVIEW

The Office of Legislative Counsel (OLC) in the Wisconsin Legislature is a proposed merger of the Legislative Council (LC) and the Legislative Reference Bureau (LRB). The OLC provides comprehensive legal services to the Legislature, including all of the following services:

- Bill drafting
- Committee staffing for both standing and study committees
- Caucus and floor staffing
- Legal advice on various topics, including open meetings, open records, contracts, ethics, and legislative procedure
- Legal and research memos and publications
- Research for legislators and staff
- Review of administrative rules
- Statutes and Administrative Code revision
- Constituent services
- New Member Institute and other legislator training

STRUCTURE

The OLC is led by a director and deputy director. The OLC is divided into four divisions: (1) Division of Administrative Services; (2) Division of Committee Services; (3) Division of Drafting Services; and (4) Division of Research and Reference Services. Each division is led by a division administrator, and each OLC employee is placed into one of the four divisions.

The OLC also contains two units: (1) Legal Services; and (2) Statutes and Administrative Code Revision, which includes the Rules Clearinghouse. Each unit is led by a lead staff person. Each unit contains members of the divisions. A division employee may be assigned to a unit to perform functions within that unit, in addition to the employee's functions within the division.

See the Appendix for an organizational chart.

FUNCTIONS

DIVISIONS

The following table outlines the general functions of each division:

Division	Functions
Administrative Services	Editing/proofing, finance, human resources, general administrative functions
Committee Services	Committee staffing, bill development, floor and caucus staffing, memos, publications (including act memos and amendment memos)
Drafting Services	Drafting and editing legislation, floor staffing, memos
Research and Reference Services	Research, constituent services, publications, library

UNITS

The following table outlines the general functions of each unit:

Unit	Functions
Legal Services	Legal advice and memos on various topics, including open meetings, open records, contracts, ethics, and legislative procedure
Statutes and Administrative Code Revision	Statutes revision, Administrative Code revision, Rules Clearinghouse

PROCESS

The creation of the OLC should be undertaken through an in-depth process that allows for a study of nonpartisan legislative services in the Wisconsin Legislature, seeks feedback and input from members of the Legislature, and allows the LC and LRB to collaboratively develop a merger plan that responds to the needs of the Legislature.

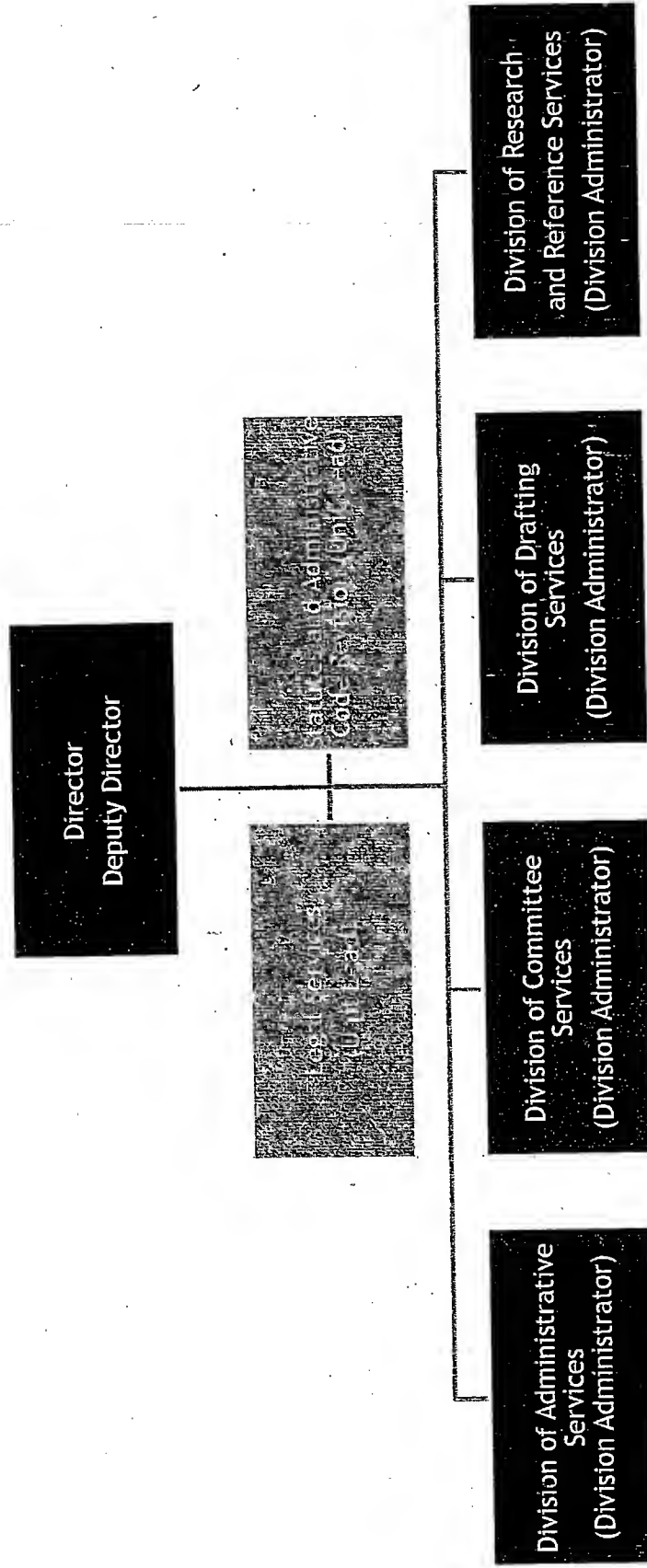
Operating under a long-term plan allows the Legislature, including the Joint Committee on Legislative Organization (JCLO), and the LC and LRB to give due consideration to the management, operations, and service issues that will arise in merging two agencies and provides for a smooth transition to a merged agency.

The following table outlines a proposed process to create the OLC, under which the creation of the OLC would be effective on January 3, 2023 (inauguration day):

Date	Activity
March 2019 to March 2020	Study nonpartisan legislative services, including the structure and functions of such services
March 2020 to March 2021	LC and LRB leadership develop a proposed merger plan, including a bill draft, and seek feedback from JCLO
March 2021 to July 2021	Bill draft is introduced and considered by the Legislature
July 2021 to April 2022	LC and LRB leadership teams meet to plan implementation
April 2022 to January 2023	LC and LRB begin implementation and training
January 3, 2023	OLC is created



Office of Legislative Counsel



Prepared by:
Jessica Karls-Ruplinger
Acting Director
Wisconsin Legislative Council



Karls-Ruplinger, Jessica

Subject:

RE: LTSB Case

From: Larson, Brian <Brian.Larson@legis.wisconsin.gov>

Sent: Monday, February 11, 2019 11:27 AM

To: Karls-Ruplinger, Jessica <Jessica.Karls-Ruplinger@legis.wisconsin.gov>

Subject: FW: LTSB Case

I. Rules regarding confidentiality, conflicts, loyalty

SCR 20:1.6 Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation...

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, 94 information relating to the representation of a client.

SCR 20:1.7 Conflicts of interest current clients

(a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in a writing signed by the client.

See also the following notes to Rule 1.7:

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the

right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

SCR 20:1.9 Duties to former clients

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

II. Rules regarding scope of representation

SCR 20:1.6 Confidentiality

Preamble (#18):

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority. Similarly, there are federally recognized Indian tribes with tribal governments in the State of Wisconsin and these tribes have rights of selfgovernment and self-determination. It is not the intent of these rules to abrogate any such authority of tribal governments

SCR 20:1.2 Scope of representation...

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. The client's informed consent must be in writing except as set forth in sub. (1).

(1) The client's informed consent need not be given in writing if:

e. the representation is provided to an existing client pursuant to an existing lawyer-client relationship

SCR 20:1.4 Communication

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests by the client for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Karls-Ruplinger, Jessica

From: Karls-Ruplinger, Jessica
Sent: Monday, February 11, 2019 4:59 PM
To: Vick, Jason
Subject: Memo
Attachments: 11roth_jkr.pdf

Importance: High

Jason,

Attached is the memo you requested. I only addressed it to Sen. Roth. You can distribute as you like.

The memo is a starting point for a discussion on the topics of confidentiality and attorney-client relationship. Each question identified in the memo has several layers to unravel. I am happy to discuss further with Sen. Roth and the others.

Jessica

Jessica Karls-Ruplinger
Acting Director
Wisconsin Legislative Council
(608) 504-5711



WISCONSIN LEGISLATIVE COUNCIL

Jessica Karls-Ruplinger, Acting Director

TO: SENATOR ROGER ROTH

FROM: Jessica Karls-Ruplinger, Acting Director

RE: Considerations Relating to Statutory Confidentiality and Attorney-Client Relationships in a Merger of the Legislative Council and Legislative Reference Bureau

DATE: February 11, 2019

During my presentation to Speaker Vos, Senator Shilling, Representative Hintz, and you on February 7, 2019, about a proposed merger of the Legislative Council (LC) and Legislative Reference Bureau (LRB), I raised questions for you to consider relating to: (1) LC and LRB confidentiality under state statute; and (2) LRB's recognition of an attorney-client relationship between LRB attorneys and persons with drafting privileges.

This memorandum, prepared at your request, provides background information on statutory confidentiality and on LRB's policy on attorney-client relationships, and it identifies questions relating to these issues for the Legislature to consider and address prior to any merger of the LC and LRB. This memorandum is intended as an overview of these issues and not as a comprehensive discussion. If you have any questions or would like additional information, I am available to discuss these issues in further detail with you.

STATUTORY CONFIDENTIALITY

Under state statute, each of the nonpartisan legislative service agencies is required to observe the confidential nature of certain communications. There is a unique statutory confidentiality requirement for each agency. The following are the confidentiality requirements for the LC and LRB:

- **Legislative Council:** "The legislative council staff ... shall at all times observe the confidential nature of the research and drafting requests received by it." [s. 13.91 (intro.), Stats.]

- Legislative Reference Bureau: "The legislative reference bureau ... shall at all times observe the confidential nature of the reference or drafting requests received by it." An exception is made for drafting files of introduced legislation; however, "[r]ecords of drafting requests which did not result in legislation introduced shall remain confidential at all times." [s. 13.92 (intro.) and (1) (a) 3. and (c), Stats.]

ATTORNEY-CLIENT RELATIONSHIP

LRB's Policy

According to its *Drafting Manual*, the LRB recognizes an attorney-client relationship with each member of the Legislature and other persons with drafting privileges:

1.01 CLIENT AND CONFIDENTIALITY. LRB attorneys maintain an attorney-client relationship with each member of the legislature and other persons with drafting privileges under s. 13.92 (1) (b) 1., stats., with respect to the provision of drafting and other legal services. Communications between a legislative attorney and a legislator or his or her staff or agent, or other person with drafting privileges, are confidential. The following communications, however, are not confidential:

- (1) Communications that are included within the drafting file of an introduced proposal. See s. 13.92 (1) (c), Stats.
- (2) Communications that the legislator, directly or through staff or other agents, has consented to be disclosed.
- (3) Communications that are otherwise exempt from confidentiality under the supreme court rules of professional conduct.

[LRB, *Bill Drafting Manual* 2019-2020, s. 1.01 (Sept. 2018).]

Under the statutes, all of the following persons have drafting privileges with the LRB and, as a result of LRB's policy, have an attorney-client relationship with LRB attorneys:

- Any member or member-elect of the Legislature and, on behalf of each committee thereof, the chairperson.
- Any agency, as defined in s. 16.70 (1e), Stats.,¹ created under ch. 13, 14, 15, or 758, Stats., which includes agencies in the executive and judicial branches.

¹ Section 16.70 (1e), Stats., defines "agency" as an office, department, agency, institution of higher education, association, society or other body in state government created or authorized to be created by the constitution or any law, which is entitled to expend moneys appropriated by law, including the Legislature and the courts, but not including an authority.

- The chief clerk of either house of the Legislature for requests pertaining to the operation of the Legislature.
- A party caucus of either house of the Legislature.

Rules of Professional Conduct

An attorney licensed in Wisconsin must comply with rules of professional conduct adopted by the Wisconsin Supreme Court. The rules are codified in ch. 20 of the Supreme Court Rules (SCR). When an attorney has an attorney-client relationship with a client, the attorney must comply with certain requirements in that attorney-client relationship. For example, the attorney has a duty of confidentiality and a duty of loyalty to a client.

Under the duty of confidentiality, an attorney generally may not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation. In addition, an attorney must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. [SCR 20:1.6 (a) and (d).]²

Under the duty of loyalty, an attorney may not represent a client if the representation involves a concurrent conflict of interest.³ However, an attorney may represent a client, notwithstanding the existence of a concurrent conflict of interest, if: (1) the attorney reasonably believes that the attorney will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the attorney in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in a writing signed by the client. [SCR 20:1.7.]

CONSIDERATIONS

Statutory Confidentiality

The LC has a broader statutory confidentiality requirement than the LRB. As described above, the LC must treat research and drafting requests as confidential. The LRB must treat reference and drafting requests as confidential, except the material contained in drafting files

² Related to confidentiality is the attorney-client privilege, which is typically asserted in a judicial proceeding. Under the attorney-client privilege, an attorney's client has a right to withhold and prevent others, including the attorney, from disclosing information about communications between the attorney and client. [s. 905.03, Stats.]

³ A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client, a former client, or a third person or by a personal interest of the attorney. [SCR 20:1.7 (a).]

for introduced legislation. The LC does not have an exception to its confidentiality for introduced legislation.

Given the differences between the LC and LRB confidentiality statutes, the Legislature should consider the statutory confidentiality of a merged agency and how to reconcile the existing statutes. In reconciling the confidentiality requirements, the Legislature might consider the following questions:

- If the LC and LRB attorneys serve as both drafters and committee staff in a merged agency, will the drafting exception apply to the drafting work product of all attorneys?
- Will the research now prepared by LC staff be subject to the drafting file exception under a merged agency?
- Should research that is not for purposes of bill drafting be confidential?
- Should the structure of two sets of attorneys remain in place, with one set retaining the LC confidentiality and the other set retaining the LRB confidentiality?
- If a drafting file exception is retained in a merged agency, what material should be included in a drafting file?

Attorney-Client Relationship

If the LC and LRB are merged into a single agency, the Legislature should consider whether the LRB's policy on attorney-client relationships applies to all attorneys in a merged agency or whether the merged agency should recognize, through its structure and functions, alternatives to LRB's policy on attorney-client relationships. For example, alternatives could include recognizing: (1) an attorney-client relationship between legislative attorneys and the Legislature as a client under an organization as a client model, rather than a model of individual legislators as clients; (2) limited scope representations, rather than the seemingly broad attorney-client relationship that is articulated in LRB's policy; or (3) no attorney-client relationship. The Legislature might also consider whether legislative attorneys should take additional steps to increase the likelihood that an attorney-client relationship would be recognized by a court.

If the LRB's policy is applied to all attorneys in a merged agency, the Legislature should consider all of the following questions:

- If drafting attorneys also serve as committee staff:
 - How would the drafting attorneys reconcile their duty of confidentiality with serving the needs of the committee in responding to questions? Under the duty of confidentiality, the drafting attorney should only reveal the information contained in the drafting file because it appears that the client (i.e., the author) has provided consent to disclose the drafting file contents. How should a drafting attorney

respond when the attorney is asked about information that was part of the drafting process but not contained in the drafting file?

- How would the drafting attorneys reconcile their role in serving all members of the committee with their duty of loyalty to the bill author? Serving that dual role may give rise to a conflict under rules of professional conduct.
- Should all attorneys in a merged agency have an attorney-client relationship with any person who has drafting privileges, including those in the executive and judicial branches? Should the attorney-client relationship only recognize legislators as clients?

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

JKR:ksm

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- How would the drafting attorneys reconcile their role in serving all members of the committee with their duty of loyalty to the bill author? Serving that dual role may give rise to a conflict under rules of professional conduct.
- Should all attorneys in a merged agency have an attorney-client relationship with any person who has drafting privileges, including those in the executive and judicial branches? Should the attorney-client relationship only recognize legislators as clients?

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

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